

BEFORE THE
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation and Decision
Against:

RANDY RAND, Ed.D.
P.O. Box 569
Mill Valley, CA 94942

Psychologist's License No. PSY 12137

Respondent.

Case No. 1F 2004 158933

OAH No. 2007080577

**MODIFIED DECISION AND ORDER
ON REMAND RE: COST RECOVERY**

On or about January 7, 2011, the Board of Psychology adopted the attached DECISION AND ORDER, effective February 6, 2011. On or about January 12, 2011, the Deputy Attorney General, representing Complainant, filed a petition pursuant to Government Code section 11518.5 for correction of a mistake in that decision, which is hereby **GRANTED**. Accordingly, the Board hereby makes the following **ORDER**:

The DECISION AND ORDER adopted January 7, 2011, is modified pursuant to Government Code section 11518.5 to read as follows:

"The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Psychology, State of California, as its Decision in the above entitled matter, except that the decision is hereby modified so that Legal Conclusion, paragraph 3, on page 6, reads as follows: 'By reason of the matters set forth in Findings 7, 8, and 9, reasonable cost recovery is allowed pursuant to Business and Professions Code section 125.3 in the amount of \$43,285.92, as reduced after applying the standards set fourth in *Zuckerman v. State Board of Chiropractic Examiners*, supra, 29 Cal.4th 32.'"

The remainder of the decision including the effective date is not modified, amended, or otherwise altered.

///
///
///
///
///

IT IS SO ORDERED this 21st day of January, 2011.

A handwritten signature in black ink, appearing to read "Richard Sherman". The signature is written in a cursive, flowing style with some capitalization.

Richard Sherman, Ph.D., President
Board of Psychology
Department of Consumer Affairs
State of California

BEFORE THE
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RANDY RAND, Ed.D.

Psychologist's License No. PSY 12137

Respondent.

Case No. 1F 2004 158933

OAH No. 2007080577

PROPOSED DECISION ON REMAND RE COST RECOVERY

Administrative Law Judge Ruth S. Astle, State of California, Office of Administrative Hearings, heard this remand matter in Oakland, California, on December 3, 2010.

Jane Zack Simon and David Carr, Deputy Attorneys General, represented complainant.

David D. Carico., Attorney at Law, represented respondent, who was present.

The matter was submitted on December 3, 2010. After the matter was submitted Deputy Attorney General Carr submitted a letter (marked as Exhibit 4 and entered into the record) that he did receive discovery from respondent by email on November 19, 2010. The matter was resubmitted December 7, 2010.

PRELIMINARY MATTERS

This matter was originally heard on June 16, 17, 18, 20, 23, 24, and July 10, 2008. The matter was submitted on September 15, 2008. A proposed decision was submitted to the Board on October 8, 2008. The Board issued a Decision After Non –Adopt on May 29, 2009, to become effective June 28, 2009. Respondent took the matter to Superior Court, County of Sacramento, for a Writ of Mandamus. A peremptory writ of mandamus was issued remanding the proceedings to the Board and commanding the Board to set aside its decision of May 29, 2009 solely with respect to the award of costs. The Board was ordered to reconsider its action pertaining to the assessment of costs against petitioner (respondent) in the light of *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32. The Board remanded the matter to the Administrative Law Judge on June 21, 2010, for the purpose of holding a limited hearing to take additional evidence and argument to determine whether respondent should be ordered to pay costs to the Board for the amount of

investigation and enforcement, including charges imposed by the Attorney General. The Board directed the Administrative Law Judge to apply the factors set out in *Zuckerman* and to develop any necessary findings of fact or conclusions of law to assess whether:

Respondent obtained a dismissal of charges or a reduction in the severity of the discipline imposed;

Respondent has a subjective good faith belief in the merits of his position;

Respondent raised a “colorable challenge” to the proposed discipline;

Respondent is financially able to make payments; and

The Board conducted a disproportionately large investigation to prove that respondent engaged in relatively innocuous misconduct.

Except for Cost Recovery¹, the Decision After Non Adopt of the Board dated May 29, 2009, is in full force and effect and respondent remains on probation upon the terms and conditions set forth therein.

FACTUAL FINDINGS

1. Robert Kahane made the accusation in his official capacity as the Executive Officer of the Board of Psychology (Board).

2. Randy Rand, Ed.D. (respondent) has held Psychologist’s License No. PSY 12137 since March 4, 1991, when it was issued to him by the Board. The license is on inactive status and will expire December 31, 2010, unless otherwise renewed. At all times relevant to this matter, respondent was licensed as a psychologist in the state of California.

Sonoma County, California, Case:

3. Respondent acted as a special master under the Sonoma County Superior Court’s jurisdiction because of issues of child custody and visitation in the dissolution matter, case number 981064, *In re the Marriage of LD and JJ*. Because of ongoing issues between the parties, especially visitation matters, husband and wife agreed to the appointment of a special master. Special masters are generally used in high-conflict family law cases. One or more of the parties is likely to be combative, adversarial and difficult to deal with. The special master must remain neutral and impartial. The special master must avoid the appearance of favoring one side or the other or appear to align himself with one side or the other.

Respondent was engaged in the practice of psychology and acting as a licensed psychologist in his role as special master. Respondent was expected to use his expertise as a psychologist in conducting his role as special master².

¹ Cost recovery is found in Factual Findings 40, 41, and 42, Legal Conclusions 8, and Order 4.

Respondent had a subjective good faith belief that the Board had a policy from 1995 through June 2005 not to take administrative action against a psychologist who was acting as a special master in Family Courts.

4. Respondent was aware of a letter dated June 24, 2005 from Kathi Burns, Enforcement Coordinator, California Board of Psychology, addressed to the mother in the Sonoma County case which states in pertinent part that: "Our legal review concluded that disagreements and/or grievance issues regarding Special Masters are to be addressed directly with the Court, as a licensing board does not have the authority to affect court orders or usurp a judge's authority. . . . Your complaint alleges that Dr. Rand violated the Special Master agreement on several levels, . . . These issues need to be directly addressed with the Judge appointed to your case, . . . The board makes every effort to ensure that the highest quality review is made of the records involved in each such complaint. When it is found that the board has no legal basis upon which to pursue action against a license of a psychologist it must close its' [sic] case." Respondent believed after seeing this correspondence that the Board would not pursue matters against him arising out of his actions as a special master and that the Board did not have jurisdiction to do so.

As a result of respondent's subjective good faith belief in a potentially meritorious defense (lack of jurisdiction), the cost recovery shall be reduced by one-third (\$21,642.67). The Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that the cost award provision does not deter licensees with potentially meritorious defenses from exercising their right to a hearing.

Respondent's assertion that the Board lacked jurisdiction in this matter constituted a colorable (plausible) defense. Respondent has met this *Zuckerman* factor.

Orange County, Florida, Case

5. Respondent testified over the telephone in a child custody matter in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. The Florida judge telephoned respondent during the hearing, placed him under oath, and questioned him about the intervention protocol for alienated children that respondent had designed. Respondent explained the origins of his program and described his protocol and the goals of his program for the court and in response to questioning by the judge, agreed that it was his conclusion that the child was "severely alienated" and that "for the child's best interest that the child's custody be changed to the mother (permanently), and that the child go through this intervention process." Respondent never personally interviewed the child. Respondent answered direct questions from the court. He indicated that he had read the report of the evaluator and that he had spoken to the therapist. Respondent gave the judge his opinion that

²The Board's experts testified that respondent's conduct in the role of special master was substantially related to the practice of psychology.

the child was severely alienated based on other professionals' reports. Respondent did not explain to the court the probable impact on the reliability and validity of his opinions of his not having personally interviewed or evaluated the child. The judge was not speaking hypothetically when he asked respondent his opinion. And, respondent did not answer hypothetically. Respondent made a custody recommendation without interviewing the child or the other parties to the action. It was established by clear and convincing evidence that this conduct constitutes an extreme departure from the standard of practice of a psychologist (gross negligence).

Respondent advised the Board in a letter dated December 12, 2006, that he had a "very peripheral involvement in this Family Law matter" and that the judge had called him at his office "for the sole purpose of inquiring about generic information pertaining to a program [that he] developed." Respondent knew that the court had asked his opinion about the specific family law matter at issue and, if the court had ordered an intervention, it was his intent to spend one week at a retreat in upstate New York performing the intervention with the child and training the child's current therapist in his technique.

6. The Sacramento Superior Court Judge in its writ Summary states that "it is immediately apparent from a comparison of this letter [respondent's letter] to the Board about his testimony in the Florida case with the transcript of the Florida court hearing that petitioner's [respondent's] response to the Board dishonestly and deceptively minimized his role in the Florida case by making it appear as though he were nothing more than an independent consultant helpfully offering information to the court. Nowhere in his response does petitioner [respondent] disclose to the Board that he was poised to conduct the intervention if the Court approved it, a critical fact that is in complete contradiction with [his] assertion that he was only providing 'generic information' about his program." The Superior Court Judge goes on to conclude that "The weight of the evidence fully supports respondent's [the Board's] finding that petitioner [respondent] dishonestly minimized his role in the Florida case." . . . "Nor can it be said that petitioner [respondent] acted in good faith in this case, whether on the advice of counsel or not, by making such an incomplete and deceptive disclosure of his conduct in relation to the Florida case."

Respondent's belief that he did not make a custody recommendation in the Florida case and that he was not dishonest or deceptive when he responded to the Board on this matter cannot be characterized as in "good faith" for purposes of assessing costs. While respondent may have a subjective belief that he did nothing wrong, that belief cannot be said to be in good faith.

Respondent's defenses to this matter do not constitute a colorable (plausible) defense. No further reduction in cost is granted for this cause for discipline.

Cost Recovery

7. Cost recovery in the amount of \$11,205.12 for investigation of this matter has been requested by the Board. The Declaration adequately sets forth the work performed. That amount remains reasonable.

8. Cost recovery in the amount of \$76,432.50 for the work performed by Deputy Attorney General Kerry Weisel was requested by the Board in this matter. That amount is reduced by \$25,000. The Declaration presented by the Deputy Attorney General at the original hearing on this matter was not adequate to determine the reasonableness of the amount requested. It was conclusionary. A new declaration was presented in this matter. The Board withdrew the Fourth Cause for Discipline from the Second Amended Accusation, because it involved privileged settlement negotiations. While an updated declaration was presented at the remand hearing, it does not change the reduction of costs based on the withdrawal or the Fourth Cause for Discipline. The Board did not conduct a disproportionately large investigation to prove that respondent engaged in relatively innocuous misconduct.

9. Cost recovery in the amount of \$237 for the work performed by Deputy Attorney General Thomas Reilly has been requested by the Board in this matter. That amount is reasonable. Cost recovery in the amount of \$2,054 for the work performed by Deputy Attorney General David Carr has been requested by the Board. That amount is reasonable. The total cost requested in this matter is \$89,928.62. This amount is reduced by \$25,000 based on the withdrawal of the Fourth Cause for discipline and \$21,642.67 for respondent's subjective good faith belief and colorable defense to the Sonoma County matter.

Ability to Pay

10. Respondent's income from consulting work was \$36,130 in 2009 and \$24,689 in 2010. His income from Social Security was \$5,580 in 2009 and \$13,282 in 2010. He has about \$33,900 in savings which he has been using for living expenses and attorneys fees. He has an equity line of credit that has \$22,625 in available credit. He used \$3,500 in 2009 and \$4,127.60 in 2010 from an IRA account, which has \$4,000 remaining. Respondent's living expenses were \$89,341 in 2010 excluding legal fees, which were not disclosed. Respondent's wife earned \$23,375 in 2010 and \$10,978 in Social Security. She has \$14,000 in an IRA account.

LEGAL CONCLUSIONS

Sonoma County, California, Case

1. By reason of the matters set forth in Findings 3 and 4, cause for a reduction in the cost recovery exists as a result of respondent's good faith belief and colorable defense

pursuant to *Zuckerman v. State Board of Chiropractic Examiners*, Supra, 29 Cal.4th 32. The amount of the reduction is \$21,642.67.

Orange County, Florida, Case

2. By reason of the matters set forth in Findings and 6, cause for reduction in the cost recovery does not exist because respondent's belief in his defense was not in good faith and he does not have a colorable defense pursuant to *Zuckerman v. State Board of Chiropractic Examiner*, supra, 29 Cal.4th 32.

Cost Recovery

3. By reason of the matters set forth in Findings 7, 8, and 9, reasonable cost recovery (as reduced) is allowed pursuant to Business and Professions Code section 125.3 in the amount of \$43,285.92. Complainant must apply the standards set forth in *Zuckerman v. State Board of Chiropractic Examiners*, supra, 29 Cal.4th 32, including examining respondent's ability to pay and setting forth a reasonable payment schedule.

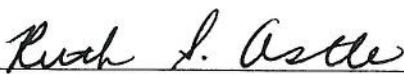
4. By reason of the matters set forth in Finding 10, respondent has demonstrated that he has a limited ability to pay. Respondent may make payments to the Board in a minimal amount per month unless and until his financial situation changes.

ORDER

Investigation/Enforcement Cost Recovery - Respondent shall pay to the Board its costs of investigation and enforcement in the amount of \$43,285.92 during the term of probation. The Board shall work out a payment plan with respondent pursuant to *Zuckerman v. State Board of Chiropractic Examiners*. Such costs shall be payable to the Board of Psychology and are to be paid regardless of whether the probation is tolled. Failure to pay such costs shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve respondent of the responsibility to repay investigation and enforcement costs.

DATED: 12/17/10



RUTH S. ASTLE
Administrative Law Judge
Office of Administrative

**BEFORE THE
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

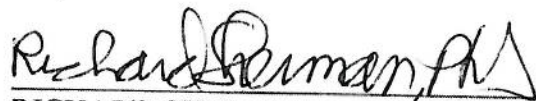
In the Matter of the Accusation filed)	Case No. 1F -2004 158933
Against:)	
)	OAH No. 2007080577
RANDY RAND, Ed.D)	
)	
Psychologist's License No. PSY 12137)	
)	
Respondent)	
_____)	

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Psychology, State of California, as its Decision in the above entitled matter.

This Decision shall become effective on February 6, 2011.

It is so ORDERED January 7, 2011.



RICHARD SHERMAN, PH.D.
PRESIDENT, BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

